

Personal Property Entireties Exemption in Michigan: Does It Apply to Modern Investment Devices?

by Paul H. Steinberg*

Introduction

Under Michigan common law, the right of survivorship in jointly held personal property was not favored unless expressly intended by the parties. Consistent with this policy, entireties ownership of personal property was not recognized at common law. In 1927, the Michigan Legislature enacted MCL 557.151, which recognized entireties ownership in specifically identified items of personal property. By recognizing entireties ownership, the act enabled a judgment debtor to protect such property from most claims of creditors, except those holding joint claims against both spouses, on the theory that the entireties estate is not severable.

Six types or classes of personal property are recognized by MCL 557.151 as having the same consequences of joint ownership as those enjoyed by husband and wife in real property. The act did not envision modern and diverse property interests with similarities to the properties described in the act but not specifically named.

A recent case, decided in the bankruptcy court and affirmed on appeal, sheds some light on the protection afforded to entireties personal property sharing some common attributes with those properties specifically identified in the act. However, the practitioner should be cautious in assuring his or her client that a particular item of personal property not specifically named in the act is free from process by aggressive judgment creditors.

This act—and the entire scheme of exemptions under Michigan law—should be reexamined and updated to eliminate ambiguities and bring such exemptions into the realities of the twenty-first century. This would benefit both judgment debtors and their creditors.

*The author gratefully acknowledges and thanks Judy B. Calton, Richard F. Fellrath, Paul J. Randel, and William H. Goldenberg for their valuable comments and assistance and, in particular, Judith Greenstone Miller for enlightening the author on the Michigan Land Contract Act and for her other helpful comments.

Entireties Ownership of Property in Michigan

The definition of entireties ownership of real property is as follows: “an estate by entireties refers to a form of co-ownership held by husband and wife with right of survivorship.”¹

Under Michigan common law, in the absence of fraud, the interest of a husband and wife in entireties property cannot be reached by a creditor of one of the spouses alone.² One notable exception emanates from the recent case *United States v Craft*, in which the U.S. Supreme Court held that a federal tax lien filed against an entireties interest of only one spouse subjects that spouse’s interest in the property to the federal tax lien. The case was remanded for a determination of the valuation of that interest.³ Although not technically an “exemption,” the protection of entireties property is the result of the nature of its ownership and not part of the statutory scheme.⁴

Entireties Ownership in Personal Property

Earlier case law disfavored joint ownership of personal property. Before 1921, the Michigan Supreme Court, in *Ludwig v Brunner*, clearly expressed the opinion that in Michigan “joint tenancy in personal property with its right of survivorship does not exist.”⁵ Furthermore, in *Hart v Hart*, the court stated the following:

From an examination of the authorities, we conclude that it is the fixed and settled law of this jurisdiction that the right of survivorship does not attach, as matter of law, to personal property held in joint ownership, nor that bequests to two or more persons by operation of law pass to the survivor; in other words, joint tenancy, in personal property, with its right of survivorship, does not obtain in this jurisdiction.⁶

In the case of *Lober v Dorgan*, the Michigan Supreme Court distinguished the facts of its case from those of *Ludwig*:

In the *Ludwig* Case we said we

would not, *as a matter of law*, infer from the words “joint tenants” the ordinary incident of survivorship, but that is not the question here. Here it is a question of contract. The parties themselves have provided for survivorship by agreement. The parties having so contracted, is there any valid reason why we should refuse to enforce their agreement? Our statute does not prohibit such a contract. There is nothing in the agreement which is immoral or against the public good.⁷

Justice Sharpe, concurring in the majority opinion of Justice Bird, made it clear that the court was not overruling prior case law and that the facts of this case distinguished themselves from earlier cases: “The right of the survivor [in this case] to take is not in any way dependent upon the joint estate. It obtains by reason of the express language of the instruments themselves. The intention is clearly expressed.”⁸ Quoting from the case of *Wait v Bovee*,⁹ the court noted, “[t]he drift of policy and opinion, as shown by legislation and judicial decisions, is strongly adverse to the doctrine of taking by mere right of survivorship, *except in a few special cases, and it should not be applied except where the law in its favor is clear.*”¹⁰

Following *Lober* in a case decided before the enactment of MCL 557.151, the Michigan Supreme Court recognized the right of survivorship in personalty (personal property) where created by the express act of the parties. However, the court found that an estate by the entirety “may not be created in personal property.”¹¹

In 1927, the Michigan Legislature enacted MCL 557.151, described as “[a]n act to provide for the joint ownership by husband and wife in joint tenancy of certain classes of personal property with right of survivorship.” It provides as follows:

All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as endorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences, and conditions as are incident to the ownership of real estate held jointly by

husband and wife under the laws of this state, with full right of ownership by survivorship in case of the death of either.

Although it is now established law that in the absence of statutory provisions to the contrary, a right of survivorship may be created in personal property¹² as recently as 1964 (37 years after enactment of 557.151). In the case of *De Young v Mesler*, Justice Souris, in his dissenting opinion, pointed out that “as a general rule . . . [a husband and wife] cannot own personalty by the entirety.”¹³

I find it impossible to read the statutory words of joint tenancy, used as they are in the classical sense of joint tenancy of realty with survivorship rights, “as if” the legislature had intended, instead, to create a statutory presumption of title by the entirety. In the first place, as has been noted above, our State does not favor entirety ownership of personalty as, concededly, it does realty, and, absent some plausible reason therefore, it defies belief that the legislature would have intended such a sharp departure from our past legal history in this State. Secondly, had the legislature so intended, it seems to me beyond doubt that it would have expressed such intention by use of language which is appropriate therefor—that it would have said “tenancy [or, more appropriately, title] by the entirety”, instead of “joint tenancy” and instead of “held jointly by husband and wife with full right of ownership by survivorship.” . . . It hardly is to be doubted that had the legislature intended by . . . [557.151] to create a *statutory presumption* that all bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness held by husband and wife as payees, indorsees, or assignees were to be held by them as entirety property, it would have stated such intention appropriately.¹⁴

It is important to note that the personal property that was the subject of analysis in *De Young* was a jointly titled debenture and that the majority opinion expressly found “that the instrument, a debenture, is specifically mentioned in the statute.”

I quote extensively from the dissent of

This act—and the entire scheme of exemptions under Michigan law—should be reexamined and updated to eliminate ambiguities and bring such exemptions into the realities of the twenty-first century.

Justice Souris not in an effort to promote its position, but to illustrate that joint ownership with rights of survivorship in personal property has historically neither been presumed nor favored by law. For this reason, MCL 557.151 should not be read expansively but should be limited to the specific properties identified in the statute itself. It is one thing to presume entireties ownership in personal property jointly held by husband and wife, which Justice Souris decries, but it is quite another thing to argue the expansion of the exemption provided by MCL 557.151 to property not specifically identified in the statute. *De Young* did not purport to do this.

The Statutory Scheme of Exemptions Under Bankruptcy Law

Although entireties property comes into the bankruptcy estate by operation of 11 USC 541, the Bankruptcy Code allows a debtor to exempt from property of the estate any property that the debtor may exempt under the Bankruptcy Code itself¹⁵ or, in the alternative, any property that is exempt under nonbankruptcy federal law or state or local law that applies on the date of the filing of the petition,¹⁶ and “any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.”¹⁷ The right of an individual debtor to exempt his or her property is an important right because, subject to certain limitations, “property exempted under . . . [11 USC 522] is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 title as if such debt had arisen, before the commencement of the case.”¹⁸

The debtor has an affirmative duty to list the property claimed as exempt.¹⁹ A party in interest, including the trustee appointed in the case, “may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under §341(a) is concluded, or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later.”²⁰ The objecting party has the burden of proof to show that the exemptions are not properly claimed.²¹ Property that is not exempt may be administered by the trustee for the benefit of creditors of the bankruptcy estate.²²

The Applicability of Case Law and MCL 557.151 to Specific Types of Personal Property

Bank Deposits

Bank deposits are not included in the phrase “other evidences of indebtedness” used in MCL 557.151.²³ In *Modderman*, the court further declared that not only are the deposits in a joint name of husband and wife subject to garnishment, but the creditor has the right to overcome the presumption that each of the parties contributed one-half of the funds.²⁴

As noted above, in Michigan, the holders of a joint bank account are joint tenants with the right of survivorship.²⁵ Moreover, MCL 487.718 provides the following:

Deposits in a statutory joint account shall be subject to the rights of creditors of the persons designated in the statutory joint account contract as owners of the funds to the extent of the ownership, except that the funds shall remain subject to laws applicable to transfers in fraud of creditors.²⁶

The distinction between survivorship and the ability to exempt property is highlighted by *Lilly v Schmock*,²⁷ in which the court acknowledged the right of parties to create a joint estate with right of survivorship in personalty in the case of bank deposits but did not recognize that such ownership protects such funds from creditor claims against one of the spouses.²⁸

Mortgages and Land Contract Vendors' Interests

A mortgage interest is an interest in real property. Therefore, if it is held by the entireties, it is subject only to claims of joint creditors. It is also well established that rents payable to husband and wife on property owned by the entireties are not subject to garnishment.²⁹

In Michigan, a land contract vendor's interest in real property has sometimes been viewed as an interest in personal property under the doctrine of “equitable conversion.” Under this doctrine, a contract for the sale of land operates as an equitable conversion: the vendee's interest under the contract becomes realty, and the vendor's interest constitutes personalty.³⁰

Although several cases have found the vendor's land contract interest to be protected as an entireties interest in personal

MCL 557.151 should not be read expansively but should be limited to the specific properties identified in the statute itself.

property,³¹ MCL 557.81 conclusively protects the survivorship rights of each mortgagee and land contract vendor who holds his or her interest by the entireties:

In all cases where a husband and wife shall sell land held as a tenancy by the entirety and accept in part payment for the purchase price the note or other obligation of said purchaser payable to said husband and wife, secured by a mortgage on said land payable to husband and wife, the said debt together with all interest thereon, unless otherwise expressly stated in said mortgage, after the death of either shall be payable to the survivor, and the title to said mortgage shall vest in the survivor, and in case a contract for the sale of property owned by the husband and wife as tenants by the entirety, is entered into by them as vendors, the same provisions herein applying to the rights of the survivors in mortgages as above set forth, shall apply to the survivor of the contract.³²

In 1998, the Land Contract Act was amended “to recognize the creation, recording, and enforcement of mortgages of the respective interests of vendors and vendees of land contracts.”³³ At least for the purposes of the act itself, it defines the interests of vendors and vendees subject to a land contract as real property interests.³⁴ As an interest in real property, and with the support of prior case law, the ability to protect either a vendor or vendee’s interest in a land contract by the entireties should be laid to rest.

Other Evidences of Indebtedness

The cases discussed previously that deal with attempts to garnish a land contract payment are instructive because they illustrate the trend of the courts to limit the scope of protection of personal property held by husband and wife to those properties specifically within the language of the statute. As noted, a land contract receivable is not considered evidence of indebtedness within MCL 557.151, but it is protected as a *real* property interest and, of course, within the specific statutory protection of MCL 557.81. The following are examples of other evidences of indebtedness that the Michigan courts have identified as either falling within or outside the protection of MCL 557.151:

• **Promissory note:** A promissory note is

specifically protected under the statute.³⁵ In the case of *Kuklish*, the court held that a promissory note made jointly to the name of husband and wife would, under MCL 557.151, pass to the wife on the death of the husband, and that his will could not defeat that right of survivorship.

• **Check:** A check made payable to a husband and wife creates an entireties interest that passes to the surviving spouse under MCL 557.151.³⁶

• **Tax refund:** In the case of *Jahn v Regan*, the U.S. District Court noted that “[u]nder Michigan law a tenancy by the entireties can only be created in personal property by statute.”³⁷ With respect to the taxpayer’s claim that a tax refund payable jointly to them as husband and wife was property protected as evidence of indebtedness and, therefore, owned by them as tenants by the entireties under MCL 557.151, the court had the following to say:

A tax refund or overpayment for a jointly filed tax return cannot be reasonably characterized as an “evidence of indebtedness” in the same manner as a mortgage or a bond. The refund plaintiffs are pursuing is not a document of indebtedness of the government. It is not even a negotiable instrument made payable to them. Therefore, plaintiffs’ joint tax overpayment is not within MCL §557.151 and not held by them as tenants by the entireties.³⁸

Exemptibility of an “Investor’s” Account or “Stock Brokerage” Account

Modern investment products are far more numerous and creative than the few designated joint ownership interests protected under MCL 557.151, which specifically references only bonds, certificates of stock, and debentures. The nature and scope of an individual’s investment interests is limitless: options; money market, mutual fund and cash management accounts; repos; certificates of deposit; variable annuities; limited partnership investments; zero coupon bonds; and managed futures are just some of the investment devices that do not neatly fall within the definitions of the statute. In a different context, the U.S. Supreme Court examined the definition of a security within the meaning of the Security and Exchange Act of 1934:

In defining the scope of the market

As an interest in real property, and with the support of prior case law, the ability to protect either a vendor or vendee’s interest in a land contract by the entireties should be laid to rest.

that it wished to regulate, Congress painted with a broad brush. It recognized the virtually limitless scope of human ingenuity, especially in the creation of “countless and variable schemes devised by those who seek the use of the money of others on the promise of profits,” *SEC v W.J. Howey Co.*, 328 U.S. 293, 299 (1946), and determined that the best way to achieve its goal of protecting investors was “to define ‘the term security in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security.’”³⁹

In the recent case of *Shapiro v Nicoloff* (*In re Nicoloff*),⁴⁰ the debtor claimed ownership in “stocks held jointly with wife,” valued at \$85,598.24. In fact, the debtor’s interest was an interest in an account designated as the “Olde Investor’s Account,” which was an investment account containing interests in publicly traded stock and money. The Olde Account was later acquired by H & R Block. The H & R investment fund did not fit within the precise definitions of bonds, certificates of stock, or debentures—the protected assets described in the statute—and so the debtor’s claim of exemption in the proceeds of the account was challenged by the trustee. If the debtor were in possession of actual certificates of stock held jointly with his wife, the trustee would likely not have challenged the debtor’s right to exempt them as entireties property. Instead, the trustee argued, the H & R account was more in the nature of a bank account, containing features of liquidity and ability to deposit cash proceeds. It was neither a bond nor certificate of stock.

The bankruptcy court overruled the trustee’s objection, and this was upheld on appeal to the district court. The court’s decision rested on the critical fact that any distribution from the account was required to be in the form of a check payable to both husband and wife, thus creating an entireties interest, relying on *Theisen v Theisen*.⁴¹ The trustee’s argument that the funds in the investment account should be treated as though they were in a joint bank account was rejected, noting that funds in a joint bank account are governed by MCL 487.703: “In Michigan, co-owners of a joint bank account are joint tenants with the right of survivorship. . . . Decisional law makes it plain

that any of the co-owners of a joint account may withdraw the entire account.”⁴² Because the funds and the investment account that was the subject matter of the *Nicoloff* case could not be withdrawn by “any” of the co-owners of the joint account, the court found that it should not be treated as a joint bank account.

Nicoloff seems to rest its decision not so much on the nature of the property itself (the court does not expressly acknowledge that the investment account is property within MCL 557.151), but on the fact that it is jointly owned. However, jointly owned property is generally not exempt from process by a creditor holding a claim against either of the co-owners. Therefore, *Nicoloff* may provide some comfort of protection for something called a “jointly owned entireties investment account,” but not a great deal.

Conclusion

If the rule of law is to provide predictability and fundamental fairness, MCL 557.151 and the general scheme of exemptions in Michigan do not serve these goals in the current debtor-creditor arena. The hodgepodge of common and statutory laws has resulted in uncertainty in the rights of creditors to attach property and of debtors to protect the same. And the list of exemptions range from the archaic (“10 sheep, 2 cows, 5 swine, 100 hens, 5 roosters, and a sufficient quantity of hay and grain . . . for properly keeping the animals and poultry for 6 months”)⁴³ to the arcane (benefit, charity, relief, or aid to be paid, provided, or rendered by a society).⁴⁴

For several years, the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar has examined the Michigan exemption scheme, and since 2001, the Advisory Committee to the Civil Law and Judiciary Subcommittee of the House Civil and Judiciary Committee has indicated an interest in reviewing Michigan’s exemption laws. If you would provide me with any comments, they would be appreciated and shared with members of these committees.⁴⁵

NOTES

1. *Lilly v Schmock*, 297 Mich 513, 517, 298 NW 116 (1941).
2. *General Electric Co v Levine*, 50 Mich App 733, 213 NW2d 811 (1973); *In re Trickett*, 14 BR 85, 86–87 (Bankr WD Mich 1981); *In re Grosslight*, 757 F2d 773, 776 (6th Cir 1985); see Bienenfeld, *Creditors v Tenancies by the Entirety*, 1 Wayne L Rev 105 (1955). *Grosslight* and *Trickett*, while acknowledging the ability of an individual debtor to exempt entireties (real) property, deal with the question of the right of a creditor holding a joint claim to attach entireties property. In such cases, a creditor, or

The court’s decision [in Shapiro v Nicoloff] rested on the critical fact that any distribution from the account was required to be in the form of a check payable to both husband and wife, thus creating an entireties interest.

a bankruptcy trustee acting on behalf of joint creditors, may preserve its rights against entireties property.

3. *United States v Craft*, 122 S Ct 1414 (2002). For a discussion of the case, see Paul L. B. McKenney, *Tax Matters: Whose House Is It Anyway?*, MI Bus LJ, Summer 2002, at 7, and Paul H. Steinberg, *Hot Issues in Consumer Bankruptcies*, Bankruptcy Nuts & Bolts at 2-2 (ICLE 2002).

4. There are numerous statutory exemptions in Michigan, including a \$3,500.00 homestead exemption and a \$750.00 personal property exemption allowed by Mich Const 1963, art 10, §3. The primary provision for protection of personal property is MCL 600.6023. See, e.g., insurance proceeds and disability benefits, MCL 500.2207 and 500.4054; workers' compensation, MCL 418.821; crime victims' compensation awards, MCL 18.362.

5. *Ludwig v Brunner*, 203 Mich 556, 559, 169 NW 890 (1918).

6. *Hart v Hart*, 201 Mich 207, 214-215, 167 NW 337 (1918).

7. *Lober v Dorgan*, 215 Mich 62, 64, 183 NW 942 (1921).

8. *Id.* at 68.

9. *Wait v Bovee*, 35 Mich 425 (1877).

10. *Lober v Dorgan*, *supra* note 6, at 68; see *In re Peterson's Estate*, 239 Mich 452, 454, 214 NW 418 (1927).

11. *Scholten v Scholten*, 238 Mich 679, 683, 214 NW 320 (1927).

12. See *Commissioner v Hart*, 76 F2d 864, 865-866 (6th Cir 1935).

13. *De Young v Mesler*, 373 Mich 499, 506, 130 NW2d 38 (1964).

14. *Id.* at 506-507.

15. 11 USC 522(b)(1).

16. 11 USC 522(b)(2)(A).

17. 11 USC 522(b)(2)(B).

18. 11 USC 522(c).

19. Fed R Bankr P 4003(a).

20. Fed R Bankr P 4003(b).

21. Fed R Bankr P 4003(c).

22. 11 USC 704.

23. *McMahon v Holland*, 260 Mich 246, 248-249, 244 NW 462 (1932); *American Nat'l Bank & Trust Co v Modderman*, 37 Mich App 639, 195 NW2d 342 (1972).

24. *American Nat'l Bank & Trust Co*, 37 Mich App at 642. In that case, however, the trial court had ruled that the creditor had not overcome the presumption of one-half ownership.

25. MCL 487.703.

26. See *State of Michigan, Department of Treasury v Comerica Bank*, 201 Mich App 318, 326, 506 NW2d 283 (1993).

27. *Supra* note 1.

28. See *Churchill, Joint Bank Accounts: One Size Doesn't Fit All*, 78 Mich Bar J 292 (1999), at 295, fn.3: "But, money in a couple's joint bank account which originated from the sale or rental of real estate owned by the entirety, may likewise be owned by the entirety; *Muskegon Lumber & Fuel Co v Johnson*, 338 Mich 655, 62 NW2d 619 (1954) and *SNB Bank and Trust v Kensey*, 145 Mich App 765, 378 NW2d 594 (1985)." This is consistent with the right of spouses to protect proceeds derived from entireties real property discussed in the previous section.

29. *People's State Bank v Reckling* 252 Mich 383, 233 NW 353 (1930); *American State Trust Co v Rosenthal*, 255 Mich 157, 237 NW 534 (1931); *Bankers' Trust Co v Humber*, 264 Mich 71, 249 NW 454 (1933).

30. *Charter Twp of Pittsfield v Saline*, 103 Mich App 99, 302 NW2d 608 (1981); *Brooks v Gillow*, 352 Mich 189, 89 NW2d 457 (1958); *In re Plymouth Glass Co*, 171 F Supp 650 (ED Mich 1957).

31. In the case of *Hendricks v Wolf*, 279 Mich 598, 602, 273 NW 282 (1937), the court held that a land contract vendor's interest was a personal property interest that did not come within the statutory phrase "other evidences of indebtedness." The court relied on the earlier case of *Commissioner v Hart*, 76 F2d 864 (6th Cir 1935), in which the court assumed, but did not decide, that a land contract came within the phrase "other evidences of indebtedness." *Hendricks* held that the interest was protected nonetheless: "Notwithstanding that land contract interests are for certain purposes deemed to be personal property, it has been the general understanding and construction of the law for many years that the right of survivorship exists with respect to land contract interests if the property was originally held as an estate by the entirety." *Commissioner v Hart* at 866.

32. See *Papp v Brownlee*, 361 Mich 501, 503, 105 NW2d 430 (1960); *Battjes Fuel & Building Material Co v Milanowski*, 236 Mich 622, 624, 211 NW 27 (1926).

33. John G. Cameron, Jr., *Michigan Real Property Law: Principles and Commentary, 2002 Cumulative Supplement to Volumes 1 and 2* at 148 (ICLE 2002).

34. MCL 565.357(2).

35. *Kuklish v Wohleben*, 349 Mich 24, 84 NW2d 535 (1957).

36. *Theisen v Theisen*, 27 Mich App 356, 183 NW2d 373 (1970).

37. *Jahn v Regan*, 584 F Supp 399, 409 (ED Mich 1984).

38. *Id.*

39. *Reves v Ernst & Young*, 494 US 56, 60-61 (1990).

40. *Shapiro v Nicoloff*, Civ. Case No. 01-CV-71591-DT (ED Mich 9/25/01) (Hon. Patrick J. Duggan) (unpubl.).

41. *Theisen v Theisen*, *supra* note 36.

42. *Shapiro v Nicoloff*, *supra* note 39, quoting from *Department of Treasury v Comerica Bank*, 201 Mich App 318, 325, 506 NW2d 283 (1993).

43. MCL 600.6023(1)(d).

44. MCL 500.8181.

45. The author would also appreciate any "war stories" or other published or unpublished opinions on personal property exemptions under Michigan law.



Paul H. Steinberg, of Steinberg & Shapiro, Southfield, represents debtors, creditors, and bankruptcy trustees in bankruptcy and insolvency matters. A majority of his practice is debtor oriented, concentrating in individual and business Chapter 7 and Chapter 11 business reorganization cases. He is a member of the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan. He has published numerous articles and has lectured to several professional groups on bankruptcy topics.